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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959 No. 838

GEORGE D. DOYEN,

Petitioner,

-vs-

PEOPLE OF THE STATE
OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969 No.

GEORGE O. DOWNES,

Petitioner,

-vs-

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Michigan entered in the above-entitled case on August 26, 1969.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the trial court is unreported and printed in Appendix B hereto, infra, p. 27a. The opinion of the Court of Appeals of Michigan is printed in Appendix B hereto, infra, p. 31a. The opinion of the Supreme Court of Michigan, printed in Appendix B hereto, infra, p. 33a is reported in 382 MICH. 778.

JURISDICTION

The decision of the Supreme Court of Michigan was entered on August 26, 1969, p. 33a infra denying leave to appeal from Michigan Court of Appeals, such denial being without prejudice to petitioner raising the issues presented in the application in any further proceedings. The jurisdiction of this Court is invoked under 28 U.S.C.A. S 1257(3).

QUESTIONS PRESENTED

Is the Statute, C.L. 1948 335.57 [MSA 1077 (1)], upon which the information in this case is based, void and unconstitutional, as being vague and indefinite as to the standards of conduct required of the petitioner.

Is the statute, the violation of which respondent is charged (C.L. 1948, 335.57 et. seq.; MSA 18.1077 et. seq.) unconstitutional, because it requires the petitioner to be a witness against himself, by showing he acted in "good faith", thus violating Federal Const. Amend. 14, Mich. Const. Art. I § 17.

Are the provisions contained in Section 1, subsections 13, 14 & 15 of Public Acts, 1937; No. 343 (C.L. 1948; Section 335.51 (13, 14, 15); MSA 18.1071 (13, 14 & 15) an unconstitutional delegation of legislative power of the Michigan legislature to the Federal Department of Treasury and the United States Congress.

Is the Michigan "Drug Act" (C.L. 1948, Section 33.51 et. seq. MSA 18.1071 et. seq.) invalid because the title thereof embraces more than one object, contrary to the Constitution of this State.

STATUTES INVOLVED

The statutory provisions involved are C. L. 1948, 335.57 (MSA. 18.1077(1) and Sec. 1, subsections 13, 14, & 15 of Public Acts, 1937; No. 343 (C. L. 1948 Section 335.51 (13, 14, 15)); MSA. 18.1071 (13, 14, 15) and C. L. 1948 Sec. 33.51; MSA. 18.1071. They are printed in Appendix A infra. p. 1a-18a.

STATEMENT

On November 14, 1967, the Defendant was arraigned on a warrant issued by a Recorder's Court Judge for the Recorder's Court for the City of Detroit, and in said Warrant the Defendant was charged with:

> ". . . from the 9th day of September, A. D. 1966, and on divers other days and duties up to and including the 10th day of July, A. D. 1967 at the City of Detroit and in the County aforesaid GEORGE O. DOWNES, late of the City of Detroit, County and State aforesaid, being a licensed physician, did then and there prescribe, certain narcotic drugs, to-wit: Methadone, Cocaine, Dilaudid, and Morphine Sulphate and Numorphan, by means of a written prescription, to certain persons, said persons known to him to be narcotic users or addicted to the use of narcotics, whose names are: LOUIS NEBULONE, SHIRLEY DAVIES, ROBERT KREUGER, MARIO DIVITA and PETER GIORDINO and by so doing was not practising in good faith and in the course of his professional practice. Section 750.335.57 C. L. 1948."
> Appendix A - p. 19a.

Upon arraignment the Defendant stood mute, and a plea of not guilty was entered for him. A Motion to Quash the Warrant and Complaint was filed on November 29, 1967, said motion printed in Appendix B - p. 21a; and in said Motion the Defendant attacked the validity of the Warrant claiming the act unconstitutional, that the statute failed to contain any prohibition against prescribing narcotics, failed to set up a standard of conduct, contained no prohibitory acts, did not define good faith, also a constitutional challenge because statute did change the burden of proof, and the statute was not enacted pursuant to constitutional mandate.

After argument of this Motion on February 14, 1968, the Judge of the Recorder's Court did deny the Defendant's Motion to Quash the Warrant; and subsequently on March 5, 1968, the Defendant was arraigned on information, which charged the same violation as contained in the Warrant above recited, printed in Appendix B - p. 23a. Defendant-petitioner stood mute, and a plea of not guilty was entered for him.

Subsequently, on March 19, 1968, a Motion to Quash the Information was filed, which Motion was filed for the same reasons as the Motion to Quash the Warrant. Said Motion being printed in Appendix B - p. 24a.

That on November 15, 1968, Judge Samuel W. Olsen, Judge of the Recorder's Court for the City of Detroit, after oral arguments on the Motion, denied said Motion.

The Defendant-petitioner on January 3, 1969, filed a Motion for Settlement of Concise Statement

of Facts, Statement of Proceedings and Fact, and Application for Leave to Appeal, said Motion having been noticed for January 8, 1969. On that date the Judge of the Recorder's Court did sign a Certificate said Certificate printed in Appendix B - p. 27a.

Petitioner sought Leave to Appeal to the Court of Appeals from the denial of the Motion to Quash the Information and this Leave to Appeal and for Stay of Proceedings was denied by the Court of Appeals on March 4, 1969. Said Order printed in Appendix B - p. 32a.

Petitioner initiated in Supreme of Michigan application for Leave to Appeal from Court of Appeals ruling. Proceedings filed March 24, 1969 which were denied by Supreme Court of Michigan on Aug. 26, 1969 without prejudice [Reported in 382 Mich. 778 and Appendix B hereto, infra p. 34a] allowing petitioner to commence these proceedings.

REASONS FOR GRANTING OF WRIT

The Court of Appeals and Supreme Court of Michigan erred in denying the application for leave by reason of the fact that the application did present meritorious reasons for the granting of said application. Notwithstanding the Certificate of Judge Olsen, "that the issues herein present a question of law for a determination as a guideline for this Court and will be a case of first impression in the State of Michigan, there having been no prior determination as to the issues raised by the petitioner in this matter."

(1) Validity of the information can be challenged upon Leave to Appeal by an Appellate Court. In People v. Austin, 370 MICH. 12, 120 N. W. 2d. 766;

301 MICH. 456, 3 N. W. 2d. 841 (1942), the Supreme Court tested the validity of information which the lower court had quashed. In this case, the high court affirmed the order of the trial court in granting the Motion to Quash the Information.

A challenge to the validity of the information can be made if granted Leave to Appeal by an Appellate Court. Dimmers v. Hillsdale Circuit Judge, 289 MICH. 482:

> "Defendant by standing mute on arraignment did not admit any authority or jurisdiction in the trial court or waive her right to challenge the information."

ARGUMENT #2

Michigan Statute, Compiled Laws 335. 57 (MSA 18. 1077 (1)), upon which the information in this case is based, is void and unconstitutional, as being vague and indefinite, as to the standard of conduct required of the respondent.

The information filed in this cause charges specifically that the Defendant

> ". . . being a licensed physician, did then and there prescribe certain narcotic drugs, to wit; Methadone, Cocaine, Dilaudid and Morphine Sulphate and Numorphan, by means of a written prescription, to certain persons, said persons known to him to be narcotic users or addicted to the use of narcotics, whose names are .... and by so doing was not practicing in good faith and in the course of his professional practice" Contrary to . . . 335. 57, 335. 70, CL 1948 as amended by 175, PA 1952, MSA 18. 1077, 18. 1090. Appendix A, Page 10a.

The provisions of the Section under which these proceedings were brought attempt to regulate the practice of a physician and in so doing, Section 335.57 Compiled Laws of 1948 (MSA 18.1077 Section (1)) provides:

> "(1) A physician . . . in good faith and in the course of his professional practice only may prescribe, administer and dispense narcotic drugs . . ."

This Section of the Statute is permissive giving the physician the right to prescribe narcotics. Nowhere in the "Drug Act" is there any section that says that the physician may not prescribe narcotics.

The key words in the Compiled Laws of 1948, Section 335.57 (MSA 18.1077 Section (1)) would be "good faith". What may be "good faith" to this Defendant may not be "good faith" to another physician. Discretion, or matters of judgment, as to proper practice vary from one practitioner to another. Each practitioner is entitled to pursue his practice in a legal manner, warranted by exercise of his judgment. Here the State is attempting to divest petitioner of his right to exercise his judgment and discretion, and substitute therefor what the State thinks should be the proper judgment and discretion as to patients that Defendant can treat, history to be taken and dosage of drugs prescribed. In People vs. Austin, 301 Mich. 456, 463 (3 N.W. 2d 841) 1942 (MSA 18.1077) Michigan Supreme Court incorporated the language of Connally vs. General Construction Co. 269 US 389:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct

> on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Connally vs. General Construction Co., 269 U.S. 385, 391 (46 Sup. Ct. Rep. 126, 70 L. Ed. 322).

In Austin the Court held that a statute, which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law. In Austin, the court cited with approval, Tozer vs. U.S., 52 Fed. 917:

> "But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." (301 Mich. 456, 463)

Section 335.57 Compiled Laws of 1948 (MSA 18.1077 Section (1)) is likewise indefinite and uncertain in failing to legally create or define any criminal offense.

Wharton Criminal Law and Procedure, Volume I, Section 18, Page 32, states:

> "A criminal statute must be definite as to the persons within the scope of the statute and the

acts which are to be penalized. If it is not definite the due process clause of the State Constitution and of the Fifth and Fourteenth Amendments of the Federal Constitution, whichever is applicable, is violated."

"If the statute is so vague and uncertain that a reasonable man would be compelled to speculate at his peril whether the statute permits or prohibits the act he contemplates committing, the statute is unconstitutional. The Legislature in the exercise of its power to declare what shall constitute a crime or punishable offense must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct."

City of Detroit vs. Bowden 6 Mich. Appeals 514, 149 NW 2d 771 (1967) (on Page 149 NW 2d 774): "From Winters 68 S. Ct. at 670; The vagueness may be from uncertainity in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt."

"Fron Lanzetta, supra, 306 at 453, 59 S. Ct. at 619; A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

"And finally from Giaccio vs. State of Pennsylvania (1966) 382 U. S. 399, 404, 86 S. Ct. 518, 521, 15 L Ed 2d 447: It would be difficult if

> not impossible for a person to prepare a defense against such general abstract charges as 'misconduct' or 'reprehensible conduct'."

Michigan adopted the "Uniform Narcotics Act," (Vol. 13 MSA, 18.1071 through 18.1098 inclusive (also known as Michigan Compiled Laws 335.51 through 335.78 inclusive)). Comparable to the Michigan statute is the Illinois Revised Statute, Chapter 38, Section 192.7, and Wisconsin Section 161.07. There have been no reported cases in Wisconsin on this subject. There is an Illinois case which sustained the validity of a charge of "good faith". (People vs. Guagliata, 362 Ill. 427 (1936)). However, after People vs. Guagliata, the Illinois Legislature in 1957 and 1959 amended the Act viz.

> "A physician may prescribe for, furnish to, or administer narcotic drugs to his patient when the patient is suffering from a disease, ailment, injury or infirmities attendant upon old age, other than for addiction. A physician shall prescribe, furnish or administer narcotic drugs only when in good faith he believes the disease, ailment, injury or infirmity requires such treatment and only in such quantity and for such length of time as are reasonably necessary; provided, however, that a physician may treat any addict who is confined to any city or county jail, penitentiary, or any county, state or federal hospital or any hospital approved by the Division for the treatment of such addiction."

Illinois Supreme Court in Guagliata refers only to the Illinois Constitution and Illinois cases cited in said opinion.

No appeal has ever been taken to any Michigan Appellate Courts on any Section of the Michigan "Drug Act" since enactment in 1937 and that guidelines for the entire medical profession are necessary.

In State vs. Hill 189 Kan. 403, 369 Pac. 2d 365, held:

> ". . . Construction of a statute by the highest court of the original state after it is adopted by another has no controlling effect on the adopting state, although it may be persuasive where it is supported by logic and good reasoning (82 CJS Statutes, 373B, P 867; State vs. O'Donnel 116 Kan 182, 185, 225 P 1078; Mc Henry vs. Hubbard supra). But another and compelling reason exists why the rule has no application here. The argument in support of it presumes a doctrine, which if followed, would substitute the supreme court of Missouri as a tribunal to determine the grave question whether the statute contravenes the constitution of Kansas in place of the supreme court of this State. The construction of a statute, the function of a court to ascertain a statute's scope and meaning, is not to be confused with the duty of determining its validity when measured by constitutional guarantees (14 Am Jur Courts 86, P 300; Williams vs. State, 81 NH 341, 125 A 661, 39 ALR 490; Boyd vs. C. C. Ritter Lumber Co. 119 Va 348, 89 SE 273, 275 LRA1917A 94.)"
>
> "It is also urged that since the statute is over a century old and that the Kansas courts have been able to judicially apply it over that period is convincing and persuasive proof of its validity.

It is true that previous decisions have been rendered in criminal cases involving the application of the statute, but, as previously noted, the state concedes it has not heretofore been challenged on the constitutional grounds presently urged. Courts are loath to hold statutes to be unconstitutional, and this Court has repeatedly held that there is time enough for it to pass upon the validity of a statute when its constitutionality is raised by one who claims injury by it. No doubt if the constitutional questions here raised had been previously presented to this court or specifically pointed out, the issues would have been determined, but the fact that an unconstitutional statute has been enacted and has remained in the statute books for a long period of time in no sense imparts legality (Board of County Com'rs of Wyandotte County vs. General Securities Corp. 157 Kan 64, 79, 138 P2d 479). Age does not invest a statute with constitutional validity, neither does it rob it of such validity (State vs. Rogers, 142 Kan 841, 848, 52 P2d 1185)."

Wharton's Criminal Law and Procedure (1957) Vol. IV, Section 1762, Page 552 states:

"It is fundamental that an indictment should set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient."

Wharton's Criminal Law and Procedure (1957) Vol. IV, Section 1762, Page 626 states:

"The general rule that an indictment or information for a statutory offense is sufficient if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words, does not apply when the statutory words do not in themselves fully, directly and expressly, without uncertainty or ambiguity, set forth all the elements and ingredients necessary to constitute the offense intended to be punished."

People vs. Golding, 275 Mich. 353 (266 NW 378 1936), at issue was Legislation affecting the operation of a private employment agency "where a fee was then and there charged to persons seeking employment!". The Court held:

"Statutes defining crimes are to be strictly construed. They must prescribe with reasonable certainty the elements of the offense." 12 C.J. 1203. "They should be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." U.S. vs. Brewer, 138, U.S. 278, and others. ". . . The Legislature must inform the citizen with reasonable precision what acts it intends to prohibit so that he may have a certain rule of conduct." 8 R.C.L. 58.

"Criminal statutes must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal." Brown vs. State, 137 Wisconsin 543 (119 NW 338)

". . . No penal law can be sustained unless its mandates are so clearly expressed that any

ordinary person can determine in advance what he may and what he may not do under it." Tozer vs. U.S., 52 Fed. 917, and others.

"No principle is more universally settled than that which deprives all Courts of power to infer, from their judicial ideas of policy, crimes not defined by statute or by common law precedents." Ware vs. Branch Circuit Judge, 75 Mich. 488 (People vs. Golding, 275 Mich. 353. 35 266 NW 378 1936)

In State vs. Hill, 189 Kan. 403, 369 Pac. 2d 365 (1962) the court reasons:

"Is the statute indefinite, uncertain and void for vagueness: Does it lack, as the defendant contends, ascertainable standards of guilt by establishing what persons are included or what acts are prohibited by its provisions in violation of section ten of our Bill of Rights and the due process clause of the Fourteenth Amendment? It is well recognized that in order to satisfy the constitutional requirements of due process, a state statute must be sufficiently explicit in its description of the acts, conduct or conditions required or forbidden, to prescribe the elements of the offense with reasonable certainty. The standards of certainty in a statute punishing for criminal offenses is higher than in those depending primarily upon civil sanction for enforcement. The offenses must be defined with appropriate definiteness. There must be ascertainable standards of guilt, but impossible standards of specificity are not required. Men of common intelligence cannot be required to guess at the meaning of the statute. The vagueness may be for uncertainty with respect to

persons within the scope of the statute or in regard to applicable tests to ascertain guilt. The test is whether the language conveys a sufficient definite warning as to the proscribed conduct when measured by common understanding and practice" (United States vs. Cardiff, 344 US 174, 73 S. Ct. 189, 97 L. ed. 200; Cramp vs. Board of Public Instruction of Orange County, Florida, 368 US 278 82 S Ct 665, 92 L ed 840; Champlin Refining Co. vs Corporation Commission 286 US 210, 52 S Ct 559, 76 L ed 1062 86 ALR 403). In United States vs. Cardiff, ". . . The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid, cf. United States vs. L. Cohen Grocery Co. 255 US 81, 41 S Ct. 298, 65 L ed 516, may be as much of a trap for the innocent as the ancient laws of Caligula . . ."

In State vs. Blaser, 138 Kan. 447, 26 P2d 593, which quoted from and followed Connally vs. General Construction Co., 269 US 385, 46 S Ct 126, 70 L ed 322, it was said:

"1. A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law" (138 Kan l. c. 448, 26 P2d l. c. 594).

". . . However, it has been held that an information in the language of a statute which does not name the acts which are prohibited, does not inform the accused of the nature and cause of

the accusation against him (State vs. Satterlee, 110 Kan 84, 202 P 636; Anno: Indefiniteness of Penal Laws, 96 L ed 374; Vol. I, Whartons Criminal Law and Procedure, 18, p. 33."

". . . In short, the statute prescribes punishment for anyone who sells or exposes to sale goods, wares or merchandise which are not 'other articles of immediate necessity' but does not define by any objective standard what constitutes a sale of property of that character, thus necessarily leaving the court and jury to determine what is or is not a sale of 'other articles of immediate necessity' in any particular case. After the sales alleged in an information or complaint are established by evidence on behalf of the state, it yet remains for the court and jury to say whether those acts are the ones that are prohibited by law (State vs. Satterlee, supra). To attempt to enforce the statute would be the equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury (United States vs. L. Cohen Grocery Co. 255 US 81, 41 S Ct 298, 65 L ed 516, 14 ALR 1045)."

ARGUMENT #3

The Statute, the violation of which respondent is charged (C. L. 1948, Section 335. 57 et. seq.; MSA 18. 1077, et. seq.) is unconstitutional, because it requires the defendant to be a witness against himself, by showing he acted in "good faith".

Petitioner contends that if a defendant is compelled to be a witness against himself under Section 335.68 of the Compiled Laws of 1948 as amended, (MSA 18.1088)[1] then this "drug act" is unconstitutional and violative of the United States Constitution, Fourteenth Amendment[2] Article I Section 17 of the Michigan Constitution of 1963[3].

---

1. "MSA 18.1088: Enforcement of act; exceptions and exemptions, burden of proof, Section 18. In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this act, it shall not be necessary to negative any exception, excuse proviso, or exemption, contained in this act, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant. (C. L. 1948 335.68)"

2. "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ."

Section 335.68 CL 1948 in substance provides that in proceedings under this section it shall not be necessary to negative any exception, excuse, proviso or exemption contained in this Act, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the Defendant.

The Complaint and Information in this case, charge that Defendant prescribed narcotic drugs to certain persons named, and "by so doing was not practicing in good faith and in the course of his professional practice." To prove "good faith" to meet the challenge of the state as to the doctor's conduct not being in good faith, upon the close of the People's case, Defendant would be required to go forward with his defense to show that his actions were in "good faith." This proof could be adduced either by the Defendant or by witnesses, including other physicians, Defendant's actions were in "good faith." Fundamental law puts the burden of proof in a criminal case rests upon the People, and it is their obligation to prove the Defendant guilty beyond a reasonable doubt. Such proof must be made out by the People. If this Court were to hold the above Section valid, upon completion of the People's proof, the posture of the case would be that the Defendant would have to prove himself innocent rather than the State prove the Defendant guilty.

ARGUMENT #4

Section 1, subsections 13, 14 & 15 of Public Acts, 1937, No. 343 (C. L. 1948 335.51 (13, 14, 15); MSA 18.1071 (13, 14, 15)), is an unconstitutional delegation of legislative power of the Michigan legislature to the Federal Department of Treasury and the United States Congress because said Sections

make reference to existing and future regulations of the U. S. Treasury, Executive Branch of the United States and the Congressional enactments, the Legislative Branch of the United States. Section 13 of the Act gives the Bureau of Narcotics of the United States Treasury Department power to make its executive edict supercede the Michigan "Drug Act" by providing therein " . . . and/or 'synthetic narcotic drugs' which the bureau of narcotics of the United States Treasury Department has designed as 'narcotics'. "

Sections 14 and 15 are violative of Michigan and Federal Constitutions because said Sections give Congress superlegislative powers over State control of the "Drug Act" and makes future laws of the United States superior to those enacted by our legislature.

Bean Co. vs The Unemployment Commission, 308 Mich. 636, 653 (14 NW 2d 524 1944) Michigan Supreme Court held:

> "The Michigan Legislature even if right in adopting Federal nomenclature of employment, did not and could not subject the act to future congressional action or subsequent federal bureau construction for, to do so, would render the act not that of State will and determination, but that of a body wholly superior in point of law to State legislative power and sovereignty. "

Colony Town Club vs. Michigan Unemployment Compensation Commission, 301 Mich. 107 (3 NW 2d. 28 1942) Michigan Supreme Court held:

> "Appellant further contends that the decision of the commissioner of internal revenue is

final and binding because of an amendment to that effect added to the Michigan statute by the 1939 legislature. This amendment (Act No. 324, Section 42, Pub. Acts 1939 (C. L. Supp. 1940, Section 8485-82, Stat. Ann. 1940 Cum. Supp., Section 17.5451)) provides:

"(7) The term 'employment' shall not include: (n) Any service not included as 'employment' under title 9 of the social security act."

"This amendment, if given the construction claimed for it by appellant, is unconstitutional in that it attempts to delegate to a Federal agency the final decision regarding the Interpretation and construction to be placed upon a State statute. It would make the decision of the commissioner of internal revenue as to who is entitled to exemption from paying the Michigan tax conclusive and binding upon the Michigan unemployed compensation commission, the appeal board, and the State courts. Such authority cannot be delegated by the legislature."

The information filed (Appendix Page 31) charges Defendant with ". . . prescribing . . . Methadone and Dilaudid; which drugs are not defined in Section 335.51 Compiled Laws 1948 as amended (MSA 18.1071)[4] includes "synthetic narcotic drugs" which the bureau of narcotics of the

4. (13) The term "narcotics," or "Narcotic drugs" means opium, or coca leaves, or cannabis, or any compound, manufacture, salt, derivative, or preparation thereof, including "exempt preparations" as specified in section 8 and/or "synthetic narcotic drugs" which the bureau of narcotics of the United States Treasury Department has designated as "narcotics".

United States Treasury Department has designated as "narcotics." Must the Defendant look elsewhere from day to day to attempt to determine what current drugs a non-Michigan agency such as the United States Department of Treasury or some non-Michigan legislature to wit: the United States Congress might define as "narcotics"?

ARGUMENT #5

The title of the act is violative of Article V, Section 21 of the Michigan Constitution of 1908[5] and Article IV Section 24 of the Michigan Constitution of 1963[6] because the title of the Uniform Narcotic Drug Act embraces more than one object and attempts to regulate the legitimate use of narcotic

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(footnote 4. continued)

(14) "Federal narcotic laws" means the laws of the United States relating to opium, coca leaves, and other narcotic drugs.

(15) "Official written order" means an order written on a form provided for that purpose by the United States commissioner of internal revenue under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law, and if no such order form is provided, then on an official form provided for that purpose by the state director of drugs and drug stores.

5. "No law shall embrace more than one subject which shall be expressed in its title..."

6. Ibid

drugs and prohibit the illegitimate use; and in connection with the prohibition, provide penalties for violation thereof.

The enacting title of Act 343 of Public Acts of 1937 as amended by Public Acts of 1949 Number 178, (MSA 18.1071 through 18.1098) (Section 335.51 through 335.78 of the Compiled Laws of 1948 as amended) for brevity to be called the "Drug Act", is:

> "An act to safeguard and regulate the legitimate use of and traffic in narcotic drugs and exempt narcotic drugs; to suppress the illegitimate use, possession, control, sale, manufacture, production, disposition, administering, compounding, dispensing, prescribing and traffic in the same; to provide a penalty for any violation of the provisions of this act; and to repeal all acts and parts of acts in anywise contravening any of the provisions of this act."

The title contains two objects; the first object is to safeguard and regulate the legitimate use of and traffic in narcotic drugs and exempt narcotic drugs. The balance of the act attempts to prohibit the use of drugs by:

> "To suppress the illegitimate use, possession, control, sale, manufacture, production, disposition, administering, compounding, dispensing, prescribing and traffic in the same; to provide a penalty . . ."

In the Matter of Charles Hauck, 70 Mich. 396, 38 N.W. 269, Michigan Supreme Court held that regulation does not include prohibition; and, therefore, the provisions of Act 197 of the Laws of 1887

to regulate the manufacture and sale of liquor and for prohibition as set forth in the title was invalid and violated Article IV Section 20 of the Michigan Constitution of 1850 (3)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted for a review of the serious constitutional issues raised.

Respectfully Submitted,

SAMUEL W. BARR
2510 David Stott Building
Detroit, Michigan 48226

Attorney for Petitioner.

(Date)
November 13, 1969

APPENDIX A

- STATUTES INVOLVED -

Uniform Narcotic Drug Act

Act 343, 1937, p. 808; ind. eff. July 28.

(Title as amended by Pub. Acts 1949, No. 178, imd. eff. May 27.)

AN ACT to safeguard and regulate the legitimate use of and traffic in narcotic drugs [and exempt narcotic drugs]; to suppress the illegitimate use, possession, control, sale, manufacture, production, disposition, administering, compounding, dispensing, prescribing and traffic in the same; to provide a penalty for any violation of the provisions of this act; and to repeal all acts and parts of acts in anywise contravening any of the provisions of this act.

The People of the State of Michigan enact:

§ 18.1071 Definitions.] SECTION 1. The following words and phrases, as used in this act, shall have the following meanings, unless the context otherwise requires:

(1) "Persons" includes any corporation, association, co-partnership, or one or more individuals.

(2) "Physician" means a licensed practitioner of medicine or osteopathy as defined by law in this state and any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment.

(3) "Dentist" means a person authorized by law to practice dentistry in this state.

(4) "Veterinarian" means a person authorized by law to practice veterinary medicine in this state.

(5) "Manufacturer" means a person who by compounding, mixing, cultivating, growing or other process, produces or prepares narcotic drugs, but does not include an apothecary who compounds narcotic drugs to be sold or dispensed on prescriptions.

(6) "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced nor prepared, on official written orders, but not on prescriptions.

(7) "Apothecary" means a licensed pharmacist as defined by the laws of this state and, where the context so requires, the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a licensed pharmacist; but nothing in this act shall be construed as conferring on a person who is not registered nor licensed as a pharmacist any authority, right, or privilege, that is not granted to him by the pharmacy laws of this state.

(8) "Hospital" means an institution for the care and treatment of the sick and injured, approved by the state director of drugs and drug stores as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist, or veterinarian.

(9) "Laboratory" means a laboratory approved by the state director of drugs and drug stores as

proper to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific and medical purposes and for purposes of instruction.

(10) "Sale" includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.

(11) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(12) "Opium" includes morphine, codeine, and heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium, but does not include apomorphine or any of its salts.

(13) [The term "narcotic," "narcotics," or] "narcotic drugs" means [opium, or coca leaves, or cannabis, or any compound, manufacture, salt, derivative, or preparation thereof, including "exempt preparations" as specified in section 8, and/or "synthetic narcotic drugs" which the bureau of narcotics of the United States treasury department has designated as "narcotics."]

(14) "Federal narcotic laws" means the laws of the United States relating to opium, coca leaves, and other narcotic drugs.

(15) "Official written order" means an order written on a form provided for that purpose by the

United States commissioner of internal revenue under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law, and if no such order form is provided, then on an official form provided for that purpose by the state director of drugs and drug stores.

(16) "Dispense" includes distribute, leave with, give away, dispose of, or deliver.

(17) "Registry number" means the number assigned to each person registered under the federal narcotic laws.

(C. L. '48, § 335.51.)

History.

As amended by Pub. Acts 1939, No. 263, eff. Sept. 29; 1949, No. 178, imd. eff. May 27.

§ 18.1072 Narcotic drugs, traffic, manufacture, etc., prohibited.] SEC. 2. It shall be unlawful for any person [duly licensed under the provisions of this act] to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this act. (C.L. '48, § 335.52.)

History.

As amended by Pub. Acts 1952, No. 132, eff. Sept. 18.

§ 18.1073 Licenses; application, filing, fee, term.] SEC. 3. No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a wholesaler shall supply the same, and no person shall sell, prescribe, administer or dispense any narcotic drugs without having first obtained a license so to do from the state director of drugs and drug stores. Application for such license

shall be in writing and shall be accompanied by the payment to said director of drugs and drug stores, [of] the sum of [$2.00] as a license fee. Such licenses shall be valid for a period of 1 year commencing on July first and ending on the thirtieth day of the next June and each license shall contain the name of the licensee and the address of the place at which said business or profession will be conducted. All licenses shall be renewable annually on or before July first of each fiscal year. (C. L. '48, § 335.53.)

History.

As amended by Pub. Acts 1956, No. 52, eff. Aug. 11.

§18.1074] Same; requirements for issuance. SEC. 4. No license shall be issued under the foregoing section unless and until the applicant therefor has furnished proof satisfactory to the state director of drugs and drug stores:

(a) That the applicant is of good moral character or, if the applicant be an association or corporation, that the managing officers are of good moral character.

(b) That the applicant is equipped as to land, buildings, and paraphernalia properly to carry on the business described in his application.

(c) That the applicant is an apothecary or that he employs an apothecary to assume charge of the narcotic drugs and preparations in his possession or under his control.

No license shall be granted to any person who has within five [5] years been convicted of a wilful

violation of any law of the United States, or of any state, relating to opium, coca leaves, or other narcotic drugs, or to any person who is a narcotic drug addict.

(C.L. '48, § 335.54.)

§18.1075 Narcotic drug sales; by a licensed manufacturer or wholesaler; written order, form, filing, federal rules; purchaser's duty as to use.] SEC. 5. (1) A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons, but only on official written orders:

(a) To a manufacturer, wholesaler, or apothecary.

(b) To a physician, dentist, or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory, but only for use in that laboratory for scientific and medical purposes.

(2) A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territorial, district, county, municipal, or insular government, purchasing, receiving, possessing, or dispensing narcotic drugs by reason of his official duties.

(b) To a master of a ship or a person in charge of any aircraft, upon which no physician is regularly employed, or to a physician or surgeon duly licensed in some state, territory or the District of Columbia to practice his profession, or to a retired commissioned medical officer of the United States army, navy or public health service employed upon such ship or aircraft for the actual medical needs of persons on board such ship or aircraft, when not in port: Provided, That such narcotic drugs shall be sold to the master of such ship or person in charge of such aircraft or to the physician, surgeon or retired commissioned medical officer of the United States army, navy or public health service employed upon such ship or aircraft only in pursuance of a special order form approved by a commissioned medical officer or acting assistant surgeon of the United States public health service.

(c) To a person in a foreign country if the provisions of the federal narcotic laws are complied with.

(3) An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two [2] years in such a way as to be readily accessible for inspection by any public officer or employe engaged in the enforcement of this act. It shall be deemed a compliance with this subsection if the parties to the transaction have complied with the federal narcotic laws, respecting the requirements governing the use of order forms.

(4) Possession of or control of narcotic drugs obtained as authorized by this section shall be lawful if in the regular course of business, occupation, profession, employment, or duty of the possessor.

(5) A person in charge of a hospital or of a laboratory, or in the employ of this state or of any other state, or of any political subdivision thereof, or a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, or a physician or surgeon duly licensed in some state, territory or District of Columbia, to practice his profession, or a retired commissioned medical officer of the United States army, navy, or public health service employed upon such ship or aircraft who obtains narcotic drugs under the provisions of this section or otherwise, shall not administer, nor dispense, nor otherwise use such drugs, within this state, except within the scope of his employment or official duty, and then only for scientific or medicinal purposes and subject to the provisions of this act.

(C. L. '48, § 335.55.)

§18. 1076 Same; by an apothecary; written prescription, oral prescription, restrictions.] SEC. 6. (1) [(a)] An apothecary, in good faith, may sell and dispense narcotic drugs to any person upon a written prescription of a physician, dentist, or veterinarian, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and the full name, address, and registry number under the federal narcotic laws of the person prescribing, if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for

which the drug is prescribed. The person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of [5] years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this act. The prescription shall not be refilled.

[(b) In lieu of a written prescription for such narcotic drugs which the Michigan state board of pharmacy, in its discretion (after considering such regulations as may be issued by the secretary of the treasury of the United States for the purpose of designating narcotic drugs which may be sold or dispensed upon oral prescriptions under federal law), shall by regulation designate to possess relatively little or no addiction liability, the sale or dispensing may be made by an apothecary upon oral prescription of a duly registered physician, dentist, or veterinarian, which oral prescription is reduced promptly to writing, and the writing filed and preserved by the apothecary for a period of 5 years from the date on which such prescription is filled in such a way as to be readily accessible to inspection by any public officer or employee engaged in the enforcement of this act. In issuing an oral prescription, the prescriber shall furnish the apothecary with the same information as is required by law or regulation in case of a written prescription for narcotic drugs except for the written signature of the prescriber, and the apothecary who fills such prescription shall be required to inscribe such information, together with the date of filling and his own signature, on the written record of the prescription made, filed and preserved by him. The prescription shall not be refilled.

(c) If the board of pharmacy shall subsequently determine that a narcotic drug, to which the oral prescription procedure described in the preceding paragraph has been made applicable, possesses a degree of drug addiction liability that, in its opinion, results in abusive use of such procedure, it shall by regulation publish such determination. The determination shall be final, and after the expiration of a period of 6 months from the date of its publication, the oral prescription procedure described in the preceding paragraph shall cease to apply to the particular narcotic drug which is the subject of the determination.]

(2) The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, or apothecary, but only on an official written order.

(3) An apothecary, only upon an official written order, may sell to a physician, dentist, or veterinarian, in quantities not exceeding 1 ounce at any 1 time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than 20% of the complete solution, to be used for medical purposes.

(C. L. '48, § 335.56.)

History.

As amended by Pub. Acts 1955, No. 193, eff. Oct. 14.

§ 18.1077 Physician, dentist or veterinarian; use allowed in professional practice.] SEC. 7. (1) A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or interne under his direction and supervision.

(2) A veterinarian, in good faith and in the course of his professional practice only, and not for use by a human being, may prescribe, administer, and dispense narcotic drugs, and he may cause them to be administered by an assistant or orderly under his direction and supervision.

(3) Any person who has obtained from a physician, dentist, or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist, or veterinarian, shall return to such physician, dentist, or veterinarian any unused portion of such drug, when it is no longer required by the patient.

(C. L. '48, § 335.57.)

§18.1083] Illegal keeping or sale; place deemed a common nuisance. SEC. 13. Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance. (C. L. '48, § 335.63.)

§18.1084 Forfeiture of drugs that have come into possession of a peace officer, disposal, record.] SEC. 14. All narcotic drugs, the lawful possession of which is not established or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(a) Except as in this section otherwise provided, the court or magistrate having jurisdiction shall

order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place, and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States commissioner of narcotics, by the officer who destroys them.

(b) Upon written application by the state commissioner of health, the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of any of them, except heroin and its salts and derivatives, to said state commissioner of health, for distribution or destruction, as hereinafter provided.

(c) Upon application by any hospital within this state, not operated for private gain, the state commissioner of health may in his discretion deliver any narcotic drugs that have come into his custody by authority of this section to the applicant for medicinal use. The state commissioner of health may from time to time deliver excess stocks of such narcotic drugs to the United States commissioner of narcotics, or may destroy the same.

(d) The state commissioner of health shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities, and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered, and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all federal or state officers charged with the enforcement of federal and state narcotic laws.

(C. L. '48, § 335.64.)

§18.1085 Violation by licensed person; record filed with board or officer issuing license; revocation, suspension; reinstatement.] SEC. 15. On the conviction of any person of the violation of any provision of this act, a copy of the judgment and sentence, and of the opinion of the court or magistrate, if any opinion be filed, shall be sent by the clerk of the court, or by the magistrate, to the board or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. On the conviction of any such person, the court may, in its discretion, suspend or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business. On the application of any person whose license or registration has been suspended or revoked, and upon proper showing and for good cause, said board or officer may reinstate such license or registration.

(C.L. '48, § 335.65.)

§18.1086 Inspections; persons eligible; knowledge confidential.] SEC. 16. Prescriptions, orders, and records, required by this act, and stocks of narcotic drugs, shall be open for inspection only to federal, state, county, and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate is a party.

(C.L. '48, § 335.66.)

§18. 1087 Unlawful acts; certain communications not privileged.] SEC. 17. (1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

(2) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(3) No person shall wilfully make a false statement in any prescription, order, report, or record, required by this act.

(4) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person.

(5) No person shall make or utter any false or forged prescription or false or forged written order.

(6) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

(7) The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of section eight [8] of this act, in

the same way as they apply to transactions under all other sections.

(C. L. '48, § 335.67.)

§18.1088 Enforcement of act; exceptions and exemptions, burden of proof.] SEC. 18. In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this act, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this act, and the burden of proof of any such exception, excuse, proviso, or exemption, shall be upon the defendant.

(C. L. '48, § 335.68.)

§18.1089 Same; Michigan board of pharmacy and other officers, co-operation with federal and other authorities.] SEC. 19. It is hereby made the duty of the [Michigan board of pharmacy, its] officers, agents, inspectors, and representatives, and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this act, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state and of all other states, relating to narcotic drugs.

(C. L. '48, § 335.69.)

History.

As amended by Pub. Acts 1949, No. 178, imd. eff. May 27.

§18.1090 Penalty.] SEC. 20. Any person [duly licensed under the preceding provisions of this act who violates] any provision of this act shall be guilty of a felony, punishable by imprisonment in the state prison for not more than [10] years or by a fine of not more than [$10,000.00]

or by both such fine and imprisonment.

(C. L. '48, § 335.70.)

History.

As amended by Pub. Acts 1951, No. 175, eff. Sept. 28; 1952, No. 132, eff. Sept. 18.

§18.1091] Persons prosecuted under federal act may not be prosecuted for same act under this act. SEC. 21. No person shall be prosecuted for a violation of any provision of this act if such person has been acquitted or convicted under the federal narcotic laws of the same act or omission which, it is alleged, constitutes a violation of this act.

(C. L. '48, § 335.71.)

§18.1092 Warrant; issuance upon sworn complaint or affidavit; search and seizure; disposal.] SEC. 22. If any person makes a sworn complaint or affidavit before any magistrate authorized to issue warrants in criminal cases that any drugs, derivatives, compounds or preparations mentioned in section [1] of this act are being possessed, sold, dispensed, distributed or given away or kept for the purpose of being possessed, sold, dispensed, distributed or given away, contrary to law, or that such drugs, derivatives, compounds or preparations are stored or concealed temporarily or otherwise in any depot, freight house, express office or in any other building or place or in any vehicle or conveyance with the apparent intention of being delivered for the purpose of being possessed, sold, dispensed, distributed or given away, contrary to the provisions of this act or that the complainant or affiant believes and has good cause to believe that such drugs, derivatives, compounds or preparations are concealed in any barn, building, place,

vehicle or conveyance, such magistrate, if he be satisfied there is reasonable cause for such belief, shall immediately issue his warrant to any officer whom the complainant may designate having power to serve criminal process, commanding him to search the premises described and designated in such complaint and warrant and if any drugs, derivatives, compounds or preparations are there found, to seize the same, together with bottles, cases, vessels or packages in which they are contained and all the implements, furniture, vehicles and conveyances used and kept for such illegal possessing, storing, selling, dispensing, distributing or giving away of such drugs derivatives, compounds or preparations and then safely keep and make immediate return on said warrant. Such drugs and other articles seized, unless the same be owned by innocent third parties, shall be held subject to the order of such court or magistrate to be used as evidence in the prosecution for the violation of this act.

(C. L. '48, § 335.72.)

§18.1093] (Repealed by Pub. Acts 1945, No. 267, imd. eff. May 25.)

§18.1094] Interpretation of act. SEC. 24. This act shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those states which enact it.

(C. L. '48, § 335.74.)

§18.1095] Receipts credited to general fund. SEC. 25. All funds collected under this act shall be deposited with the state treasurer and credited to the general fund.

(C. L. '48, § 335.75.)

§18.1096] (Repealed by Pub. Acts 1945, No. 267, imd. eff. May 25.)

§18.1097] Short title. SEC. 27. This act may be cited as the uniform narcotic drug act.
(C.L. '48, § 335.77.)

§18.1098 "Person" defined; use of singular and plural.] SEC. 28. As used in this act the term "person" includes individual, partnership, corporation and association, and words in the singular shall include the plural and vice versa.
(C.L. '48, § 335.78.)

APPENDIX B

PROCEEDINGS IN LOWER COURT AND APPELLATE COURT RULINGS

COMPL.) Nar. Bur.
)
DEPT.) 15062 Houston Whittier

Criminal Warrant

STATE OF MICHIGAN,)
County of Wayne) ss. K
City of Detroit.)

To the Superintendent, or any Captain, Lieutenant, Sergeant, Detective or Patrolman of the Metropolitan Police Force of the City of Detroit, in said County, GREETING:

WHEREAS, WALTER SCOTT hath this day made complaint to the undersigned, Hon. ELVIN L. DAVENPORT a Judge of the Recorder's Court, of the City of Detroit, in said County, that heretofore, to-wit, from on the 9th day of September, A.D. 1966, and on divers other days and dates up to and including the 10th day of July, A.D. 1967 at the City of Detroit and in the County aforesaid GEORGE O. DOWNES, late of the City of Detroit, County and State aforesaid, being a licensed physician, did then and there prescribe, certain narcotic drugs, to-wit: Methadone, Cocaine, Dilaudid, and Morphine Sulphate and Numorphan, by means of a written prescription, to certain persons, said persons known to him to be narcotic

users or addicted to the use of narcotics, whose names are:

LOUIS NEBULONE, SHIRLEY DAVIES, ROBERT KREUGER, MARIO DIVITA and PETER GIORDINO

and by so doing was not practising in good faith and in the course of his professional practice

Section 750.335.57 C.L. 1948

Contrary to the Form of the Statute, etc.

And WHEREAS, on examination, on oath of said Complainant, by me, the said Judge of the Recorder's Court, it appears to me that said offense has been committed, and there is just cause to suspect the said accused part Y to have been guilty thereof; THEREFORE,

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, You and each of you are hereby commanded forthwith to take the said accused part Y and him bring before the Recorder's Court, of the City of Detroit, at the Municipal Court Building, in the said City of Detroit, to be dealt with according to law.

WITNESS, The Hon. THOMAS L. POINDEXTER, Presiding Judge of the Recorder's Court of the City of Detroit.

Given under my hand and seal, at the City of Detroit, in said County, on the 11th day of November, A.D. 1967.

/s/ E. L. Davenport

MOTION TO QUASH A WARRANT
(Formal Parts Omitted)

The Defendant upon arraignment of the warrant in this case having stood mute does hereby move this Court to quash the warrant issued in this cause for the following reasons:

1. That the warrant charges the Defendant of "violation of Section 18, 1977 M.S.A. otherwise known as 335.57 Compiled Laws, State of Michigan" and which provides "A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or interne under his direction and supervision."

2. That the provision of the statute above referred to, does not in law constitute a crime in Michigan for the following reasons:

a. That the said statute does not contain any prohibition against the execution or delivery of prescriptions.

b. That there are no standards of conduct prescribed.

c. That there is no prohibitory act contained therein.

d. That there is no definition of good faith.

e. The requirements of the statute would change the burden of proof in that it would require the Defendant to prove himself innocent rather then to have the State prove him guilty beyond a reasonable doubt.

f. That the Defendant would be prohibited from testifying in this cause because of the privileged communication existing between the Defendant and any patient in the event the Defendant is called upon to prove good faith.

3. That the statute is unconstitutional for the following reasons:

a. That the matters included in the statute are not germane to the general purpose as expressed in its title.

b. That the penalty statute does not prescribe any penalty for violation of the section under which this warrant is issued.

FOR THE REASONS stated the Defendant moves this Court to quash the warrant issued in this cause.

GEORGE O. DOWNS /s/
George O. Downs

/s/ SAMUEL W. BARR
Samuel W. Barr
Attorney for Defendant
2510 David Stott Building
Detroit, Michigan 48226
Wood. 1-5480

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

On this 29th day of November, 1967, before me, a notary public in and for said county, personally appeared the Defendant, George O. Downs,

who made oath that he has read the Motion to Quash the Warrant, and the same is true of his own knowledge.

_____

Notary Public, Wayne County, Michigan

My commission expires _____

Criminal
~~XXXXXXX~~ INFORMATION, Recorder's Court

STATE OF MICHIGAN)
County of Wayne) ss.
City of Detroit)

The Recorder's Court of the City of Detroit

In the Name of the People of the State of Michigan, WILLIAM L. CAHALAN Prosecuting Attorney in and for the said County of Wayne, who prosecutes for and on behalf of the People of said State in said Court, comes now here in said Court in the January term thereof, A. D. 1968, and gives the said Court to understand and be informed that

GEORGE O. DOWNES,

late of the said City of Detroit, in said County, heretofore, to-wit, on the 9th day of September, A. D. 1966 and on divers other days and dates up to and including the 10th day of July, A. D. 1967, at the said City of Detroit, in the County aforesaid

being a licensed physician, did then and there prescribe, certain narcotic drugs, to wit, Methadone, cocaine, dilaudid, and morphine sulphate and numorphan, by means of a written prescription, to certain persons, said persons known to him to be narcotic users or addicted to the use of narcotics, whose names are:

LOUIS NEBULONE, SHIRLEY DAVIES, ROBERT KREUGER, MARIO DIVITA and PETER GIORDINO,

and by so doing was not practicing in good faith and in the course of his professional practice;

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

Note-See Sec. 750.335.57, 335.70, C.L. 1948 as amended by Act 175, P.A. 1952

WILLIAM L. CAHALAN
Prosecuting Attorney

Drafted by S. H. Boak /s/
YB

MOTION TO QUASH INFORMATION
(Formal Parts Omitted)

The Defendant was arraigned in this Court on March 5, 1968 and stood mute at such arraignment and did inform the Court that he would file a motion to quash the information and makes this motion to quash the information for the following reasons:

1. That the warrant and information charged the Defendant with "violation of Section 18, 1977 M.S.A. otherwise known as 335.57 Compiled Laws, State of Michigan" and which provides "A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or interne under his direction and supervision."

2. That the provision of the Statute above referred to, does not in law constitute a crime in Michigan for the following reasons:

a. That the said Statute does not contain any prohibition against the execution or delivery of prescriptions.

b. That there are no standards of conduct prescribed.

c. That there is no prohibitory act contained therein.

d. That there is no definition of good faith.

e. The requirements of the Statute would change the burden of proof in that it would require the Defendant to prove himself innocent rather then to have the State prove him guilty beyond a reasonable doubt.

f. That the Defendant would be prohibited from testifying in this cause because of the privileged communication existing between the Defendant and any patient in the event the Defendant is called upon to prove good faith.

3. That the Statute is unconstitutional for the following reasons:

a. That the matters included in the Statute are not germane to the general purpose as expressed in its title.

b. That the penalty statute does not prescribe any penalty for violation of the section under which this warrant is issued.

4. That M.S.A. 18.1088 being 335.68 Compiled Laws, requires the Defendant "In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this act, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this act, and the burden of proof of any such exception, excuse, proviso, or exemption, shall be upon the Defendant," and this requirement would consequently require Defendant to prove himself innocent and hence is likewise, invalid.

FOR THE REASONS stated the Defendant moves this Court to quash the information and warrant issued in this cause.

/s/ SAMUEL W. BARR

Samuel W. Barr
Attorney for Defendant
2510 David Stott Building
Detroit, Michigan 48226
Wood. 1-5480

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

On this 18 day of March, 1968, before me, a notary public in and for said county, personally appeared Samuel W. Barr who made oath that he has read the foregoing motion to Quash the Information and the same is true of his own knowledge.

_____
Notary Public, Wayne County, Michigan

My commission expires _____

CERTIFICATE
(Formal Parts Omitted)

That I, SAMUEL H. OLSEN, one of the Judges of the Recorder's Court for the City of Detroit, hereby certify that after due notice I have settled the foregoing as a concise Statement of Proceedings and Fact in support of the Application for Leave to Appeal in said cause, and further certify that the Statement fairly presents the statements for review in said cause, and further certify that there is a vast difference of opinion in the legal profession concerning the interpretation of the Section of the statute upon which the warrant and information was drawn, and that the issues herein present a question of law for a determination as a guideline for this Court and will be a case of first impression in the State of Michigan, there having been no prior determination as to the issues raised by the Appellant in this matter.

/s/ Samuel H. Olsen
SAMUEL H. OLSEN
Judge of the Recorder's Court
for the City of Detroit

Approved as to
form Thomas P.
Smith APA
March 21, 1969

DOCKET JOURNAL OF THE RECORDER'S COURT
OF THE CITY OF DETROIT
File No. A 141842

At a session of the Recorder's Court of the City of Detroit, in the County of Wayne, State of Michigan, held in and for said city at the court-room of said Court, in the year of our Lord, on the dates specified below.

Present: Hon. Vincent J. Brennan, Judge of the Recorder's Court and Recorder of the City of Detroit. Robert J. Colombo, George W. Crockett, Jr., Elvin L. Davenport, Robert E. DeMascio, Geraldine Bledsoe Ford, Joseph A. Gillis, Donald S. Leonard, Joseph E. Maher, Samuel H. Olsen, Thomas L. Poindexter, Frank G. Schemanske, Gerald W. Groat - Interim

Judges of the Recorder's Court of the City of Detroit.

THE PEOPLE OF THE STATE OF MICHIGAN
VS. A-141842

GEORGE O. DOWNES

Complainant WALTER SCOTT
Complaint Filed.)
Warrant Issued On) NOVEMBER 11, 1967

By the Hon. RICHARD D. DUNN

Complaint For VIOLATION OF UNIFORM NARCOTIC DRUG ACT - Sec. 335.57, CL 1948

Before Judge Richard D. Dunn, Municipal Judge Assigned to Recorder's Court on the Fourteenth Day of November, 1967.

Defendant arraigned in open Court, complaint read. Court orders examination set for the twenty-ninth day of November, 1967 and defendant released upon his personal recognizance, in the sum of Five Hundred Dollars, for his appearance in Court on said date.

G

Before Judge Richard D. Dunn
On The Twenty Ninth Day of November, 1967.
Attorney S. Barr.

Motion to Quash the Information, Suppress the Evidence and Discharge defendant filed and noticed for hearing on the seventh day of December, 1967.

Court orders examination adjourned to the seventh day of December, 1967.

G

Before Judge Richard D. Dunn, Municipal Judge Assigned to Recorder's Court On The Seventh Day of December, 1967

Attorney S. Barr
Court Reporter, Joseph M. Burnett.
Court orders complaint and warrant amended to add "Sec. 335.70 C.L. 40 as amended by Act 175 P.A. 1952.
Court orders examination adjourned to the fourteenth day of February, 1968.

D

Before Judge Robert J. Colombo
On The Fourteenth Day of February 1968
Attorney Samuel W. Barr.
Motion to Quash the Warrant heard and denied by the Court.

Motion to Quash information filed by defense counsel.

Defendant in open court waived examination. Court orders defendant held for trial, and personal bond continued.

L

Before Judge Joseph E. Maher
On The Twenty-Fifth Day of March, 1968.

Court orders hearing on Motion to Quash the Information adjourned to the first day of April, 1968.

J

Before Judge Elvin L. Davenport
On The Fifth Day of March, 1968

Attorney Samuel W. Barr.

All Pre-Trial Proceedings assigned to Judge Samuel H. Olsen, by Presiding Judge Elvin L. Davenport.

Information filed for the crime of Licensed Physcian Prescribing Narcotic Drugs not in Good Faith. Defendant arraigned in open Court, stands mute. Court orders plea of not guilty entered and bond continued.

D

Before Judge Joseph E. Maher
On The Eighth Day of April, 1968.

Motion to Quash the Information dismissed by the Court for lack of appearance.

J

Before Judge Samuel H. Olsen
On The Tenth Day of October, 1968

Motion to Quash the Information to be heard on the thirty first day of October, 1968. (Defense attorney not notified on the eighth day of April, 1968) Court orders cause adjourned to the fifteenth day of November, 1968.

k

Before Judge Samuel H. Olsen
On The Fifteenth Day of November, 1968
Motion to Quash the Information heard and denied by the Court. (entry continued)

Before Judge Samuel H. Olsen
On The Fifteenth Day of November, 1968
(entry continued)

The Court grants a Stay of Proceedings for Ninety Days until the twenty second day of February, 1969 to Perfect an Appeal.
k
Before Judge Samuel H. Olsen
On The Seventh Day of January, 1969
Attorney Samuel Barr.
Statement of Proceedings and Facts Supporting the Application for Leave to Appeal, from the order of the Court, Concise Statement of Fact, Application for Leave to Appeal, Affidavit, Certificate of Court settling Concise Statement of Proceedings and Fact file as of the third day of January, 1969 by Defense Attorney. Noticed for Hearing on the eighth day of January, 1969.
k
Before Judge Samuel H. Olsen
On The Eighth Day of January, 1969
Attorney Samuel Barr.
On motion of Thomas R. Smith, Assistant Prosecuting Attorney, Certificate is approved and signed as to form, Notice of Presentment and hearing waived by the Court.
k

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 3rd

day of March in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable

Robert B. Burns
Presiding Judge

Thomas M. Burns
Donald E. Holbrook
Judges

People of the State of Michigan
Plaintiff-Appellee

vs No. 6843

George O. Downes,
Defendant-Appellant

In this cause an application for leave to appeal and a motion for stay of trial having been filed by defendant-appellant, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court;

IT IS ORDERED that the application and motion be, and the same hereby are DENIED, for lack of merit in the grounds presented.

STATE OF MICHIGAN - ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause;

that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 4th day of March, in the year of our Lord one thousand nine hundred and sixty-nine.

/s/ Ronald L. Dzierbicki
Clerk

5-368 5-368a

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 26th day of August in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable

THOMAS E. BRENNAN,
Chief Justice,

JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

The People of the
State of Michigan,
Plaintiff and Appellee

vs 52416

George O. Downes
Defendant and Appellant

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, as defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the determination of the Court of Appeals was clearly erroneous, such denial being without prejudice to the defendant and appellant raising the issues presented in the application in any further proceedings in this case. The motion by defendant and appellant for stay or proceedings if leave to appeal is granted is DENIED, as thereby becoming moot.

STATE OF MICHIGAN - ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 26th day of August in the year of our Lord one thousand nine hundred and sixty-nine.

/s/ Donald F. Winters
Clerk.

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